petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

STATEMENT

In July 2002, Cross-Respondent filed this action in federal district court challenging Cross-Petitioners' conduct in state court custody proceedings regarding her daughter. Cross-Respondent's First Claim for Relief alleged that, under the Federal Indian Child Welfare Act ("ICWA"), Cross-Petitioner Lake County Superior Court lacked subject matter jurisdiction over the underlying involuntary custody proceedings. Specifically, the First Claim for Relief alleged that 25 U.S.C. § 1911(a) vests jurisdiction over involuntary custody proceedings exclusively in the Tribe, and thus alleged that the State had acted outside its authority.

Cross-Petitioners moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), arguing *inter alia* that the Federal District Court lacked subject-matter jurisdiction over the claim under the *Rooker-Feldman* doctrine. The District Court denied that motion.

On appeal, the Ninth Circuit agreed with the District Court's determination that it had subject-matter jurisdiction over the case. While the Ninth Circuit determined that the *Rooker-Feldman* doctrine would apply to bar federal court jurisdiction absent a statutory exception, it unanimously affirmed that ICWA, 25 U.S.C. § 1914, and 28 U.S.C. § 1331 created such an exception by explicitly granting federal courts subject-matter jurisdiction to invalidate actions that violated Section 1911 of ICWA.

REASONS FOR DENYING THE CROSS-PETITION

The Cross-Petition presents no cert-worthy issue. The lower courts properly held that ICWA Section 1914 and 28 U.S.C. § 1331 expressly permit a federal district court to review a state court's involuntary custody proceedings to ensure compliance with ICWA. Rather, in raising this issue,

the Cross-Petition reveals the type of procedural distraction that historically has impeded timely resolution of ICWA claims and prevented them from receiving meaningful appellate review. In so doing, the Cross-Petition provides no new basis for review but instead demonstrates why the critical issues presented in the original Petition for certiorari will rarely reach this Court and why review should be granted as to the question presented in that Petition.

As explained in the original Petition for certiorari, this case concerns whether the state courts of California exceeded their jurisdiction under Section 1911 of ICWA when they authorized the involuntary removal of an Indian child domiciled on the reservation from her home, and authorized the permanent placement of that child with a non-tribal family. ICWA Section 1914 expressly provides that a federal court of competent jurisdiction may review and "invalidate" any state court action that "violated any provision of section[] 1911." 25 U.S.C. § 1914. In their Cross-Petition, Cross-Petitioners concede, as they must, that the plain language of Section 1914 permits a federal district court to review and invalidate state court involuntary removal and adoption proceedings as exceeding the state court's jurisdiction. They argue, however, that Congress somehow implicitly limited that federal jurisdiction to review of only ongoing state court proceedings. Thus, they argue that notwithstanding the plain language of Section 1914 granting federal courts the power to "invalidate" state court actions that "violated" *inter alia* Section 1911, this Court should grant certiorari to consider whether the *Rooker-Feldman* doctrine applies. That doctrine provides that federal district courts lack subject-matter jurisdiction to review a final state court judgment absent a statutory or other exception. *See, e.g., Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, __, 125 S. Ct. 1517, 1521-22 (2005). Not only does the text of Section 1914 fail to support the State's unprecedented interpretation, but the

AG's tortured reading of Section 1914 would also frustrate the purpose of ICWA and undermine this Court's well-developed *Younger* abstention doctrine, which discourages federal interference with ongoing state court proceedings.

Section 1914 is unambiguous; it permits a federal court to "invalidate" – that is, nullify – a state court "action." This choice of words clearly contemplates review and potential nullification of a completed decision in an action, i.e., a final judgment. Non-determinative, non-final orders by the state court are not an "action" nor are they a completed judicial determination that can be "invalidated." Moreover, in many cases, Sections 1911, 1912, and 1913 of ICWA may be "violated" only by a final decision, rather than by any interim determination.

Moreover, Cross-Petitioners' argument cannot be squared with fundamental principles of federalism. This Court has long recognized that federal courts must assume that state courts will faithfully dispense their independent duty to enforce federal law and thus federal courts generally should not enjoin or otherwise interfere with ongoing state court proceedings. Thus, this Court's *Younger* abstention doctrine generally precludes a federal court from enjoining state prosecutions or certain state civil proceedings involving dispositive questions of federal law. *See Younger v. Harris*, 401 U.S. 37, 39-40 (1971); *Moore v. Sims*, 442 U.S. 415, 422 (1979) (federal court may not temporarily enjoin state child custody action involving federal due process question). Perversely, in the name of federalism, Cross-Petitioners would have this Court create an exception to the constitutionally-based *Younger* abstention doctrine, instead of merely honoring the plain language of Section 1914 establishing a congressional exception to the statutory *Rooker-Feldman* doctrine. Even if the language of Section 1914 were ambiguous (which it is not), interests of federalism

and constitutional avoidance would support the Ninth Circuit's interpretation.

If anything, the State's insistence on avoiding federal review of adoption proceedings illustrates for the Court why cases such as this appear before the Court so rarely, and why review should be granted in the underlying Petition. As the Ninth Circuit noted, although almost twenty-eight years has passed since Congress enacted ICWA and although different states have resolved the issue of exclusive tribal jurisdiction differently, the question of whether tribes have exclusive jurisdiction over involuntary child custody proceedings involving children domiciled on a reservation has never reached the courts of appeals until this case. *Doe v. Mann*, 415 F.3d 1038, 1039 (9th Cir. 2005). Because child-custody matters are so time-sensitive, and because cases such as this take years to litigate through the appellate courts due to the states' various procedural roadblocks, the question of custody will almost always be overtaken by the passage of time before it can reach this Court. In particular, proceedings may be mooted by the child's coming of age before the federal courts can review the case, or because the child's advancing age and need for stability causes the parties to conclude that it would be impractical to disturb the child's custody arrangement. The Cross-Petition thus highlights why this case presents such a rare opportunity for this Court to review and decide the critical issue of whether an Indian child may be taken from Indian lands and Indian parents by non-Indian courts in PL-280 jurisdictions.

I. THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH THE *ROOKER-FELDMAN* DOCTRINE.

A. The Plain Text of § 1914 Permits Review of Final State Court Judgments Because § 1914 Allows Federal Courts to Hear Petitions to "Invalidate" a State Court "Action."

Section 1914 permits an Indian child "who is the subject of any action for foster care placement or termination of parental rights," her parents, or her tribe, to "petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of Sections 1911, 1912, and 1913 of this title."[1] Cross-Petitioners argue that this statute permits a court of competent jurisdiction to interfere only with an ongoing state action, and does not allow the reviewing court to disturb a final state judgment. This interpretation has never been adopted by any court and is wholly unsupported. The sole textual basis for Cross-Petitioners' interpretation is that Section 1914 refers to the affected Indian child in the present tense: an Indian child "who *is* the subject of any action." Cross-Petition at 9.

Cross-Petitioners' fixation with the meaning of the word "is" causes them to ignore all of the actual operative terms in Section 1914 that refute their interpretation: "invalidate," "action," and "violated." As a preliminary matter, the use of the word "is" to describe a child's situation provides no insight on the relevant question: a child, parent or tribe "is"

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[1] Section 1914 allows a "court of competent jurisdiction" to hear such petitions. Cross-Petitioners do not take issue with the Ninth Circuit's holding that Section 25 U.S.C. § 1911(d), in conjunction with 28 U.S.C. §1331, creates jurisdiction to hear these petitions in the federal district courts.

the subject of an action whether that action is ongoing or is now a final judgment from which they now seek review, so use of the term "is" gives no indication of Congress' intent in enacting Section 1914. In contrast, Congress' choice of the word "invalidate" is telling. "Invalidate" has a clear and unambiguous meaning, which is "to make invalid; nullify." American Heritage Dictionary of the English Language, 920 (4th ed. 2000). The plain text of Section 1914 thus contemplates that a "valid" judicial action may thereafter be reviewed and nullified by a federal court. *Shaw v. Delta Air Lines*, 463 U.S. 85, 97 (1983) ("We must give effect to [the] plain language [of a federal statute] unless there is good reason to believe Congress intended the language to have some more restrictive meaning.").

Similarly, Congress' use of the term "action" debunks Cross-Petitioners' interpretation. Had Congress intended to limit review only to interim decisions of a state court – for example, overturning an evidentiary determination of a state court under ICWA § 1912(c) – it presumably would have limited review to only specific state court decisions under Sections 1911, 1912, and 1913, or otherwise referred to "interlocutory review" of non-final orders, rather than allowing review of an entire "action."

Finally, Congress' choice of the term "violated," in the past tense, confirms its intention to permit review of final decisions of the state courts. 25 U.S.C. § 1914 (permitting petitions to invalidate a state action on the grounds "that such action *violated* any provision of sections 1911, 1912, and 1913 of this title.") (emphasis added). Had Congress intended to permit interference only with ongoing state proceedings, it would have used the present tense of the word, i.e., allowing petitions on the grounds "that such actions *violate* any provision…of this title."

Not surprisingly, no state or federal case has ever adopted

Cross-Petitioners' strained interpretation of Section 1914. Given the absence of a split over interpretation or a persuasive showing that the Ninth Circuit's decision offends Congress' language and purpose, the issue presented in the Cross-Petition raises no cert-worthy question.

B. Section 1914 Reflects The Fact That Federalism and Judicial Economy May Favor Waiting Until A State Action Is Final Before Seeking Federal Review.

Cross-Petitioners contend that Sections 1911, 1912, and 1913 concern principally intermediate issues that often could be raised during the course of a child custody proceeding and not solely at the end of such a proceeding. This argument, however, misses the mark. An interim decision (such as whether a state court gave adequate notice or permitted appropriate inspection of documents, *see* Section 1912) may not warrant federal review – for example if the tribe, child, or Indian parent prevails. Moreover, some decisions may not even be known until a final judgment of adoption is entered – for example, whether the state court gave full faith and credit to tribal proceedings (§ 1911(d)).

As this Court has recognized in other contexts, judicial economy disfavors reviewing "intermediate" issues on a piecemeal basis before a final judgment has been rendered. *See, e.g., Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-46 (1949). Review of interim rulings would waste valuable judicial resources as the case bounced back and forth between the state and federal court. *See id.* at 546 ("The purpose [of 28 U.S.C. § 1291] is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results.").

C. Reading § 1914 to Require Interference with Ongoing State Proceedings On Penalty of Losing Any Federal Review Would Undermine the Goal of Comity Embodied in *Rooker-Feldman* By Disrupting State Court Proceedings and Would Create More Uncertainty in Child Dependency Actions.

Cross-Petitioners assert that review is warranted because their interpretation of Section 1914 is somehow vital to accomplishing interests of comity and finality. Cross-Petition at 10-11. At the very least, Cross-Petitioners offer no basis for finding that these interests would be better served by their proposed interpretation of Section 1914. On the contrary, the Ninth Circuit's interpretation ensures that a state court has a full and fair opportunity to enforce ICWA's provisions, to proceed quickly in resolving time-sensitive custody issues without undue delays in federal court proceedings, and to avoid federal review altogether depending upon the outcome of the custody judgment.

D. Cross-Petitioners' Reading of § 1914 is Inconsistent with Fundamental Principles of Federalism.

Finally, Cross-Petitioners contend that review should be granted because of *Rooker-Feldman's* importance in promoting the interests of federalism. Cross-Petition at 10-11. As noted, the *Rooker-Feldman* doctrine is a statutory creation that Congress may, and does, limit. *See, e.g.*, *Mozes v. Mozes*, 239 F.3d 1067, 1085 n.55 (9th Cir. 2001) (noting that under 42 U.S.C. § 11603(a) "Congress has expressly granted the federal courts ... the power to vacate state custody determinations and other state court orders that contravene the [Hague Convention on the Civil Aspects of International Child Abduction]"); *In re Gruntz*, 202 F.3d 1074, 1078-79 (9th Cir. 2000) (en banc) (noting that federal habeas corpus

and bankruptcy statutes permit federal collateral review of certain state court judgments). By contrast, the interpretation urged by Cross-Petitioners would have profound consequences for the constitutionally-based principles of federalism. It would force federal courts to interfere with ongoing state proceedings – staying and enjoining those proceedings even on issues that could be obviated by that state court's ultimate judgment. Such a rule would offend the federalism principles underlying the *Younger* abstention doctrine.

The *Younger* abstention doctrine generally prevents federal courts from enjoining involuntary child custody proceedings brought by a State. *Moore v. Sims*, 442 U.S. 415 (1979). This broad limitation arises from the structure of the Constitution itself, which reserves to states their traditional functions. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 10 (1987) ("[The *Younger* doctrine] is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.") (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971)).

Ironically, Cross-Petitioners ask this Court to compromise the Constitutional principles embodied in *Younger* abstention – by forcing parties to seek interim stays and injunctions of ongoing state court proceedings in all cases involving ICWA – in the interest of avoiding the application of a Congressionally-created exception to the statutory *Rooker-Feldman* doctrine. In contrast to *Younger*, it is well-recognized that Congress has the power to limit *Rooker-Feldman's* use, *see, e.g.*, *Mozes*, 239 F.3d at 1085 n.55, and that the *Rooker-Feldman* doctrine is far from essential to the

operation of our federalism. *See Exxon Mobil Corp.*, 544 U.S. 280, __, 125 S. Ct. 1517, 1521-22 (2005); *Lance v. Dennis*, 546 U.S. __, __, 126 S. Ct. 1198, 1203 (2006) (Stevens, J., dissenting) ("Last Term, in JUSTICE GINSBURG's lucid opinion in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, the Court finally interred the so-called '*Rooker-Feldman* doctrine.'"). Accordingly, at the very least, it would be far less offensive to state sovereignty to read Section 1914 as merely limiting the reach of another federal statute, 28 U.S.C. § 1257, than to interpret it as *compelling* the types of stays and injunctions of state court proceedings that *Younger* has long taught should be permitted only in extraordinary cases.

II. THE QUESTION PRESENTED IN CROSS-RESPONDENT'S PETITION FOR CERTIORARI IS OF NATIONAL IMPORT AND IS UNLIKELY TO COME BEFORE THIS COURT AGAIN IN THE FORESEEABLE FUTURE.

The issue raised by this Cross-Petition is, if nothing else, illustrative of why cases such as this so rarely reach the courts of appeals, let alone this Court. The series of decisions that underlie the Petition for certiorari in this Court arose from a procedural motion brought by the Cross-Petitioners. Both the District Court and the Court of Appeals took a year *each* after the matters were submitted before issuing their respective rulings. In the meantime, a child who was only nine at the time of her forced adoption became a teenager. While different jurisdictions have adopted different rules with respect to recognizing the exclusive jurisdiction of tribes in such proceedings, families generally cannot obtain a final judicial resolution of these issues before it would become impractical to disturb the placement of the child in question.

Because of the time and difficulty of cutting through the procedural thicket exemplified by this Cross-Petition, the

critical issues raised in Mary Doe's Petition will continue to go unresolved absent this Court's review of this matter. It is no mystery why it has taken almost twenty-eight years since Congress enacted ICWA for this issue to finally present itself. It is unrealistic to expect other families to endure the years of litigation and uncertainty required to bring a case such as this before this Court when, as a practical matter, the mere passage of time will require the appropriate tribunal – whether state or tribal – to leave the existing placement undisturbed. As this Court itself recognized in *Bryan v. Itasca County*, it took 4 years for that case to reach this Court, 426 U.S. 373, 375 (1976), and by that point the equities of any child custody decision will necessarily have changed.

To wait for another case to come along would virtually ensure that hundreds more Indian children could be taken from Indian lands and Indian parents by non-Indian courts in PL-280 States – potentially in direct violation of federal law – before this matter is decided. As Congress warned when it enacted ICWA, these are not issues that should be left to the discretion of different jurisdictions, each interpreting federal law differently. "There can be no greater threat to 'essential tribal relations,' and no greater infringement on the right of the ... tribe to govern themselves than to interfere with tribal control over the custody of their children." Indian Child Welfare Act of 1978, H.R. REP. NO. 95-1386, at 14-15 (July 24, 1978), *reprinted in* 1978 U.S.C.C.A.N. 7530. Petitioner thus respectfully requests that the Court deny certiorari as to the conditional Cross-Petition and grant certiorari only as to the issue raised in the Petition itself.

CONCLUSION

For the reasons stated above, the Cross-Petition for a writ of certiorari should be denied and the Petition for a writ of certiorari should be granted.

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No. 05-951

In The Supreme Court of the United States

ARTHUR MANN, *et al.*,

Cross-Petitioners,

v.

MARY DOE,

Cross-Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CROSS-PETITIONERS' REPLY MEMORANDUM

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QUESTION PRESENTED

Whether 28 U.S.C. § 1331 and the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901-1963, authorize the lower federal courts to review and invalidate final state court judgments in child custody proceedings involving Indian children, or whether such review is barred by the *Rooker-Feldman* doctrine.

REPLY MEMORANDUM

I. SUMMARY

As the decision below noted, the question presented by the opening petition is "an issue of first impression for the federal courts." (Pet. App. 3a, 34a.) Although the Respondents and Cross-Petitioners ("Superior Court") believe that the question presented by the opening petition is not worthy of review, should the Court grant the opening petition to reconcile the operation of Public Law 280 and the Indian Child Welfare Act ("ICWA"), the Court should also grant the conditional cross-petition to consider the jurisdictional question of first impression that it presents – whether ICWA creates an exception to the *Rooker-Feldman* doctrine.

The Superior Court concedes that both the *Rooker-Feldman* doctrine and *Younger* abstention provide important safeguards that free the exercise of state court jurisdiction from unwarranted federal judicial interference. However, if ICWA is to be understood as authorizing some form of federal review of state court proceedings, construing 28 U.S.C. § 1914 as an exception to *Younger* abstention rather than *Rooker-Feldman*, is more compatible with ICWA's statutory scheme and purposes. Under the facts presented here, the construction of ICWA urged by the Superior Court would result in the dismissal of this case, and allow the Court to leave for another day the precise nature of the exception to *Younger* created by section 1914, if any. This construction would also compel future litigants to pursue timely appellate review before the state courts.

II. ARGUMENT

The text of section 1914 suggests that it applies only when an Indian child "is the subject" of an action for "foster care placement or termination of parental rights," and allows a remedy for violation of the various procedural actions enumerated in section 1911 through section 1913. (Cond. Cross-Pet., pp. 8-11.) Cross-Respondent has asserted that the Superior Court's construction of ICWA is "inconsistent with fundamental principles of federalism." (Opp. Cond. Cross-Pet., p. 15.) Whether a state court proceeding is ongoing or has been concluded without resort to state appellate processes, federal judicial intervention is inevitably offensive to the dignity of the State in some way. However, the construction adopted by the Ninth Circuit would permit a losing state court litigant to re-file in federal court without allowing the state courts an opportunity for appellate review, rendering the state court process meaningless.[1] This outcome would also render much of ICWA a nullity, because it is designed to protect Indian children by imposing procedural requirements upon state courts, not by establishing the federal courts as the forum of Indian child custody proceedings. ICWA's House Report confirms this reading:

> While the committee does not feel that it is necessary or desirable to oust the States of their traditional jurisdiction over Indian children falling within their geographic limits, it does feel

[1] Cross-Respondent apparently believes the Superior Court should find solace in the notion that it could avoid federal court review "depending on the outcome of the custody judgment" it renders. In other words, its judgment will be respected only if it rules for litigants in Cross-Respondent's position. (Opp. Cond. Cross-Pet., p. 15.)

> the need to establish minimum Federal standards and procedural safeguards in State Indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family and the Indian tribe.

H.R.Rep. No. 1386, 95th Cong., 2d Sess. 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7350, at 7541. Yet an ouster of traditional state jurisdiction over Indian children is precisely what the Ninth Circuit decision below would accomplish. ICWA's plain text does not mandate this result.

Cross-Respondent appears to contend that an exception to the *Rooker-Feldman* doctrine would have no impact on state sovereignty. The *Rooker-Feldman* doctrine and *Younger* abstention are both intended to ensure that state court adjudications are protected from unwarranted federal judicial interference. *See Exxon Mobil Corp. v. Saudi Basic Ind. Corp.*, 544 U.S. 280, __, 125 S.Ct. 1517, 1522 (2005) (the *Rooker-Feldman* doctrine recognizes that district courts are not authorized to exercise appellate jurisdiction over state-court judgments); *Moore v. Sims*, 442 U.S. 415, 423 (1979) (*Younger* abstention reflects a strong policy against federal intervention in state judicial processes in the absence of great and immediate irreparable injury to the federal plaintiff). Exceptions to either doctrine may be enacted by Congress or recognized by the courts in appropriate circumstances. *See Exxon Mobil*, 544 U.S. at ___, 125 S.Ct. at 1526, n.8 ("Congress, if so minded, may explicitly empower district courts to oversee certain state-court judgments"); *Moore*, 401 U.S. at 424 (federal intervention is permitted where an on-going state-court proceeding is conducted in bad faith). While what Congress intended to accomplish in section 1914 is not free from

doubt (*see, e.g., Morrow v. Winslow*, 94 F.3d 1386, 1395 (10th Cir. 1996)), the text of ICWA does not support the notion that Congress intended to create an exception to the *Rooker-Feldman* doctrine.

A refusal to recognize section 1914 as an exception to *Rooker-Feldman* would not compromise *Younger* principles by compelling stays and injunctions of state court proceedings that would otherwise be permitted only in extraordinary cases. In fact, recognition that *Rooker-Feldman* bars the exercise of federal jurisdiction in this case would underscore the applicability of *Younger* as a bar to such relief in all but the most extraordinary cases. Moreover, the Cross-Respondent's argument that this Court should recognize an exception to a jurisdictional rule (*Rooker-Feldman*), in order to preserve a prudential rule (*Younger* abstention), would invert traditional jurisprudential priorities: the Court should not give the claimed exception to *Rooker-Feldman* any less scrutiny simply because recognizing the exception would allow federal courts to avoid the difficult task of determining when *Younger* should apply.

Finally, the parties agree that child custody matters are extraordinarily time sensitive. Yet this case exemplifies why federal review of a final, lower state court judgment does not ensure timely resolution. The underlying child custody proceeding commenced on June 9, 1999, the day after Jane Doe confided to Cross-Respondent that she had been sexually abused. Almost seven years later, Jane's young life continues to be disrupted by litigation, and there is no end in sight because her ICWA claims continue to languish before the district court. In contrast, had Cross-Respondent availed herself of the state appellate process and there alleged the same violations of ICWA that

remain pending before the district court today, this litigation would certainly be resolved by now.

CONCLUSION

For the reasons stated above, and in the conditional cross-petition, if the opening petition for a writ of certiorari is granted, the cross-petition for a writ of certiorari should also be granted.

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